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No. 97-521

In the Supreme Court of the United States

OCTOBER TERM, 1997

LINDA TACKETT AND GRAYSON TACKETT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a corrupt endeavor to influence a grand jury witness may be prosecuted under 18 U.S.C. 1503.

2. Whether petitioners were properly convicted of endeavoring to obstruct justice under 18 U.S.C. 1503, notwithstanding that the subpoenaed witness whom they sought to influence was never called to testify.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 113 F.3d 603.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1997. A petition for rehearing was denied on June 23, 1997. The petition for a writ of certiorari was filed on September 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioners Linda and Grayson Tackett were convicted of

obstruction of justice, in violation of 18 U.S.C. 1503. In addition, Grayson Tackett was convicted of making a false statement on a required firearm record, in violation of 18 U.S.C. 924(a)(1)(A). Pet. App. A4-A5. Linda Tackett was sentenced to 21 months' imprisonment, to be followed by two years of supervised release, and fined $4,000. Grayson Tackett was sentenced to 18 months' imprisonment, to be followed by two years of supervised release, and fined $4,000. Gov't C.A. Br. 2.

1. On December 6, 1991, petitioners' son, Brian Tackett, burned down a church in Bowling Green, Kentucky. In June 1992, he was indicted, along with several other individuals, in the United States District Court for the Western District of Kentucky for conspiring to commit arson, in violation of 18 U.S.C. 371. In addition, he was charged with arson, in violation of 18 U.S.C. 844(i); interstate transportation of a stolen motor vehicle, in violation of 18 U.S.C. 2312; and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Pet. App. A2; Gov't C.A. Br. 2-3.

The firearm that Brian Tackett was charged with carrying when he burned the church was a .45 caliber Colt pistol. Steve Kirby, a federally licensed firearms dealer, sold the pistol to Brian Tackett in March or April 1991, but Kirby did not complete an ATF Form 4473 for the transaction (as required by 27 C.F.R. 178.124) or record the sale in his transfer log (as required by 27 C.F.R. 178.125(e)). Pet. App. A3; Gov't C.A. Br. 3.

In September 1992, three months after his son was indicted, Grayson Tackett visited Kirby's gun shop. He asked Kirby to fill out an ATF Form 4473 to show that Grayson Tackett, not his son, had purchased the

.45 caliber Colt pistol from Kirby on December 16, 1991. Kirby did so. At that time, he did not realize the significance of the false transaction date, which was ten days after the church had burned down. Pet. App. A3; Gov't C.A. Br. 3-4.

In early 1993, Linda Tackett obtained a copy of the falsified ATF Form 4473 from Kirby and gave the form to her son's lawyer. On February 16, 1993, her son's lawyer filed a motion to dismiss the firearms count of the indictment based on the form. Shortly thereafter, ATF Agent Ray Wilt received a copy of the motion and the form. On February 22, 1993, Agent Wilt questioned Kirby about the form, but Kirby maintained that the form was correct. Pet. App. A3; Gov't C.A. Br. 4-5.

On March 3, 1993, Agent Wilt interviewed Kirby again. Changing his story, Kirby told the agent that petitioners' son had purchased the pistol in early 1991. Kirby asserted that the ATF Form 4473 had been altered, but he denied that he had altered the form himself. The following day, Agent Wilt served Kirby with a subpoena to testify before a grand jury. Kirby then told the agent that he had falsified the form when Grayson Tackett visited his gun shop in September 1992. Kirby agreed to cooperate with the agent and to arrange a tape-recorded meeting with petitioners to verify that his account was true. Pet. App. A3-A4; Pet. 11-12; Gov't C.A. Br. 5-6.

Kirby telephoned petitioners and set up a meeting at his gun shop. During that meeting, on March 5, 1993, Kirby told petitioners that he had been subpoenaed by a grand jury to answer questions about the ATF Form 4473. He reminded petitioners that their son had purchased the .45 caliber Colt pistol in early 1991, but petitioners told Kirby to "stick to [his]

records" and to tell the grand jury that Grayson Tackett purchased the pistol on December 16, 1991. Pet. App. A4; Gov't C.A. Br. 7-8.

During a subsequent meeting on March 7, 1993, Grayson Tackett gave Kirby a letter written by Linda Tackett. The letter instructed Kirby to tell the grand jury that he had never sold any guns to petitioners' son, and that "[t]he only people that know the real truth are Grayson and me." It further instructed Kirby to testify that he sold the .45 caliber Colt pistol to Grayson Tackett on December 16, 1991, and that Kirby had the pistol in his possession before that date. Pet. App. A4; Gov't C.A. Br. 8-10.

On March 8, 1993, Agent Wilt testified before the grand jury about his investigation of the ATF Form 4473. Kirby did not testify before the grand jury. That same day, the grand jury returned a two-count indictment against petitioners. Pet. App. A4; Gov't C.A. Br. 10.

2. Petitioners were tried on a three-count superseding indictment. Both petitioners were convicted of endeavoring to obstruct justice between March 5 and 7, 1993, by asking Kirby to give false testimony under oath to the grand jury, in violation of 18 U.S.C. 1503. Grayson Tackett was also convicted of making a false statement on the ATF Form 4473, in violation of 18 U.S.C. 924(a)(1)(A).[1]

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[1] At the close of the government's proof at trial, the district court granted petitioners' motion to dismiss a third count of the indictment charging an additional violation of Section 1503. Pet. App. A4 n.3; C.A. App. 448-450.

3. The court of appeals affirmed petitioners' convictions, but remanded for resentencing. Pet. App. A1-A22.[2] The court rejected petitioners' argument that prosecutions for obstructing justice by tampering with a witness may be brought only under 18 U.S.C. 1512, and not under the omnibus clause of 18 U.S.C. 1503, which prohibits, *inter alia*, "corruptly * * * endeavor[ing] to influence, obstruct, or impede, the due administration of justice." 18 U.S.C. 1503(a). See Pet. App. A5-A15. The court concluded that Congress did not implicitly repeal the omnibus clause of Section 1503 when it enacted the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4, 96 Stat. 1249-1253. That Act adopted Section 1512 to deal with witness tampering and simultaneously deleted provisions from Section 1503 that specifically addressed efforts to influence or injure witnesses. Pet. App. A5-A13. The court likewise concluded that the omnibus clause of Section 1503 was not implicitly repealed by the Minor and Technical Criminal Law Amendments Act of 1988, Pub. L. No. 100-690, Tit. VII, Subtit. B, § 7029(c), 102 Stat. 4398, which included non-coercive witness tampering within the scope of Section 1512. Pet. App. A14-A15. The court accordingly held that "the omnibus clause [of Section 1503] continues to prohibit witness tampering." *Id.* at A15. The court noted that, of the eight circuits that had previously addressed the question, only one had reached a contrary conclusion. *Id.* at A5 (citing cases).

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[2] The court ordered resentencing on the ground that the sentencing judge had not made required findings with respect to disputed matters under the Sentencing Guidelines. Pet. App. A20-A22.

The court of appeals also rejected petitioners' claim that their conduct did not constitute obstruction of justice, within the meaning of Section 1503, because the government had already decided not to call Kirby as a grand jury witness before petitioners attempted to influence his testimony. Pet. App. A15-A17. Citing *Osborn* v. *United States*, 385 U.S. 323, 333 (1966), the court explained that Section 1503 requires only that a defendant attempt to obstruct a judicial proceeding, not that he succeed in doing so. Pet. App. A16. An endeavor to obstruct justice violates Section 1503, therefore, "even if, unbeknownst to the defendant, the plan is doomed to failure from the start." *Ibid.* Accordingly, because petitioners, "knowing that the grand jury was investigating the events surrounding the ATF form, tried to persuade Kirby to present false testimony," they were properly convicted under Section 1503. *Id.* at A17.

ARGUMENT

1. Petitioners contend (Pet. 17-20) that prosecutions for obstructing justice by tampering with a witness may be brought only under 18 U.S.C. 1512, and not under 18 U.S.C. 1503. The court of appeals, consistent with seven of the eight other circuits that have addressed the issue, correctly rejected that claim. The issue does not merit further review.

a. The witness tampering statute, Section 1512, specifically prohibits attempts to influence a witness's testimony. The obstruction of justice statute, Section 1503, specifically prohibits endeavors to influence jurors or court officials, and more generally prohibits other efforts to obstruct justice.

Section 1503 previously contained a provision prohibiting endeavors to "influence, intimidate, or im-

pede any witness," or to injure a witness, "on account of his testifying or having testified." 18 U.S.C. 1503 (1976). Congress deleted that provision in 1982, at the same time that it enacted Section 1512. See Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4(a) and (c), 96 Stat. 1249-1250, 1253. Congress did not, however, alter the "omnibus" clause of Section 1503. That clause generally prohibits "influenc[ing], obstruct[ing], or imped[ing], or endeavor[ing] to influence, obstruct, or impede, the due administration of justice." 18 U.S.C. 1503(a). The omnibus clause had been used to prosecute witness tampering before 1982 notwithstanding the more specific witness provisions elsewhere in the statute.[3]

As originally enacted, Section 1512 prohibited only witness tampering through threats and violence. In 1988, Congress amended Section 1512 to include witness tampering by "corrupt[] persua[sion]." See Minor and Technical Criminal Law Amendments Act of 1988, Pub. L. No. 100-690, Tit. VII, Subtit. B, § 7029(c), 102 Stat. 4398. Again, however, Congress did not alter Section 1503's omnibus clause.

b. The court of appeals correctly held that Section 1512, as enacted in 1982 and as amended in 1988, did not implicitly repeal the omnibus clause of Section 1503 as applied to witness tampering. "It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." *Randall* v. *Loftsgaarden*, 478 U.S. 647, 661 (1986). The Court has thus stated that one statute will not be held to have

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[3] See, *e.g.*, *United States* v. *Johnson*, 605 F.2d 729, 730-731 (4th Cir. 1979), cert. denied, 444 U.S. 1020 (1980); *United States* v. *McCarty*, 611 F.2d 220, 224 (8th Cir. 1979), cert. denied, 445 U.S. 930 (1980).

implicitly repealed another unless the two statutes are in "irreconcilable conflict" or the later statute "covers the whole situation of the earlier one and is clearly intended as a substitute." *Ibid.*

Neither standard is satisfied here. There is no "irreconcilable conflict" between Section 1503 and Section 1512. Those statutes define distinct criminal offenses and, by refraining from committing both offenses, individuals may easily comply with both statutes. Section 1512 does not cover "the whole situation" of the omnibus clause of Section 1503. Each statute prohibits substantial conduct that is not prohibited by the other. Nor is there any indication that Section 1512 was "clearly intended as a substitute" for the omnibus clause of Section 1503. The two statutes were designed to serve different, albeit complementary, goals: Section 1503 protects judicial proceedings against corruption, by whatever means, whereas Section 1512 protects witnesses themselves, whether or not a judicial proceeding has commenced.

As noted above, Section 1512, as enacted in 1982, applied only to witness tampering through threats and violence, whereas Section 1503 also covered attempts to bribe or otherwise corruptly persuade a witness. Accordingly, if the original Section 1512 had implicitly repealed the omnibus clause of Section 1503 as applied to witnesses, it would have decriminalized non-coercive witness tampering. The court of appeals recognized that "[t]here is, of course, absolutely no indication that Congress intended" its adoption of Section 1512 to produce such an anomalous result. Pet. App. A12.

Moreover, although Congress amended Section 1512 in 1988 to include non-coercive witness tampering, Congress did not suggest that Section 1512, as

amended, was a substitute for the omnibus clause of Section 1503. The amendment eliminated any uncertainty created by the Second Circuit's aberrational holding that Section 1512 had partially repealed Section 1503 (see *United States* v. *Hernandez*, 730 F.2d 895 (1984)) by making clear that non-coercive witness tampering remained a federal crime. The principal author of the amendment thus explained that its purpose was "merely to include in section 1512 the same protection of witnesses from non-coercive influence that was (*and is*) found in section 1503." 134 Cong. Rec. S17,369 (daily ed. Nov. 10, 1988) (statement of Sen. Biden) (emphasis added); see Pet. App. A14-A15 (observing that the legislative history "suggests that the drafters of the 1988 legislation believed both that the omnibus clause of § 1503 still prohibited witness tampering and also that prosecutions under their proposed law would be allowed to proceed under either provision").

The existence of some overlap in the conduct prohibited by Section 1503 and Section 1512 does not indicate implicit repeal. See *United States* v. *Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part and dissenting in part) ("The fact that there is now some overlap between § 1503 and § 1512 * * * hardly leads to the conclusion that § 1503 was, to the extent of the overlap, silently repealed."). It is not unusual for a particular act to violate more than one criminal statute. In such situations, a defendant may be punished under any statute that he has violated. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 123-126 (1979); *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952).

c. All but one of the circuits that have addressed the question have agreed with the court below that

the omnibus clause of Section 1503 continues to apply to witness tampering. See, *e.g.*, *United States* v. *Maloney*, 71 F.3d 645, 659 (7th Cir. 1995), cert. denied, 117 S. Ct. 295 (1996); *United States* v. *Moody*, 977 F.2d 1420, 1424 (11th Cir. 1992), cert. denied, 507 U.S. 944 (1993); *United States* v. *Kenny*, 973 F.2d 339, 342-343 (4th Cir. 1992); *United States* v. *Marrapese*, 826 F.2d 145 (1st Cir.), cert. denied, 484 U.S. 944 (1987); *United States* v. *Risken*, 788 F.2d 1361 (8th Cir.), cert. denied, 479 U.S. 923 (1986); *United States* v. *Lester*, 749 F.2d 1288, 1295 (9th Cir. 1984); *United States* v. *Rovetuso*, 768 F.2d 809, 824 (7th Cir. 1985), cert. denied, 474 U.S. 1076, 1106 (1986); *United States* v. *Wesley*, 748 F.2d 962, 964-965 (5th Cir. 1984), cert. denied, 471 U.S. 1130 (1985). Only the Second Circuit has held that witness tampering may no longer be prosecuted under Section 1503 and must be prosecuted under Section 1512. See *United States* v. *Hernandez*, 730 F.2d at 899; accord *United States* v. *Gabriel*, 125 F.3d 89, 104 n.12 (2d Cir. 1997); *United States* v. *Masterpol*, 940 F.2d 760, 762-763 (2d Cir. 1991). This Court has repeatedly denied certiorari on the issue. See, *e.g.*, *Branch* v. *United States*, 488 U.S. 1018 (1989); *Risken* v. *United States*, 479 U.S. 923 (1986); *Rovetuso* v. *United States*, 474 U.S. 1076 (1986); *Cooper* v. *United States* and *Wesley* v. *United States*, 471 U.S. 1130 (1985).[4]

Although, for the reasons discussed above, the Second Circuit's view limiting the use of Section 1503 with respect to witness tampering is incorrect, the

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[4] The Court declined to reach the issue in *United States* v. *Aguilar*, 515 U.S. at 600 & n.1. Justice Scalia, in an opinion joined by Justice Kennedy and Justice Thomas, concluded that Section 1512 did not implicitly repeal the omnibus clause of Section 1503 as applied to witness-related conduct. See *id.* at 615-616 (Scalia, J., concurring in part and dissenting in part).

present conflict appears to be of little practical importance. As a result of the 1988 amendment that extended Section 1512 to non-coercive witness tampering, most of the witness-related conduct that is prosecuted in other circuits under Section 1503 may be prosecuted in the Second Circuit under Section 1512. See *United States* v. *Aguilar*, 21 F.3d 1475, 1485 & n.6 (9th Cir. 1994) (en banc) (observing that the 1988 amendment to Section 1512 "obviated" the circuit conflict on this issue), aff'd in part and rev'd in part on other grounds, 515 U.S. 593 (1995).

2. Petitioners also contend (Pet. 20-22) that they were not properly convicted under Section 1503 of endeavoring to obstruct a judicial proceeding, because the government had already decided not to call Steve Kirby, the gun dealer, to testify before the grand jury by the time that petitioners sought to influence him. That fact-specific issue, which petitioners concede presents no circuit conflict (Pet. 22), does not merit further review.

Petitioners do not contest that there was, in fact, a grand jury proceeding underway to investigate the circumstances surrounding the ATF form, or that Kirby had been subpoenaed on March 4, 1993, to testify before that grand jury on March 8, 1993. Pet. 12.[5] Nor do they dispute that they were aware

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[5] The prosecutor conducting the grand jury investigation testified that, after Kirby received the subpoena and changed his story on March 4, 1993, "there was no longer a compelling need for [Kirby] to testify," and that he "estimate[d] then that Special Agent Wilt would have testified as a grand jury witness concerning the entire investigation." C.A. App. 264-265. While the subpoena to Kirby was not formally withdrawn, the prosecutor advised Kirby on March 7, 1993, that he would not

of those facts on March 5 and March 7, when they attempted to influence Kirby's grand jury testimony. Pet. 13. The court of appeals correctly concluded that it was irrelevant, in those circumstances, whether the government still intended to use Kirby as a grand jury witness. As the court explained, petitioners were convicted of *endeavoring* to obstruct justice, and "an endeavor to obstruct justice violates the law even if, unbeknownst to the defendant, the plan is doomed to failure from the start." Pet. App. A16. See *Osborn* v. *United States*, 385 U.S. 323, 333 (1966) (Section 1503 "is not directed at success in corrupting a juror but at the 'endeavor' to do so").

To the extent that petitioners purport to rely on this Court's decision in *United States* v. *Aguilar*, *supra*, any such reliance is misplaced. See Pet. 21 (acknowledging that petitioners did not argue on appeal that *Aguilar* bars their conviction). In *Aguilar*, the Court held that a defendant's "endeavor must have the natural and probable effect of interfering with the due administration of justice" in order to violate the omnibus clause of Section 1503. 515 U.S. at 599 (internal quotation marks omitted). That standard was not satisfied in *Aguilar* because the evidence did not indicate that the defendant contemplated that his false statement to an investigator would be conveyed to a grand jury. *Id.* at 601. The Court did not indicate in *Aguilar* that a defendant's conduct must actually interfere with the administration of justice. To the contrary, the Court explained that Section 1503's omnibus clause is violated "where the defendant acts with an intent to obstruct justice, and in a manner

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be required to attend the grand jury session scheduled for the next day. *Id.* at 273.

that is likely to obstruct justice, but is foiled in some way." *Id.* at 601-602. The Court therefore noted that a jury could properly find a defendant guilty under Section 1503 if, in circumstance similar to those here, "a defendant with the requisite intent [were] to lie to a subpoenaed witness who is ultimately not called to testify." *Id.* at 602. Unlike the defendant in *Aguilar*, there was no question here that petitioners had the requisite intent and acted in a manner that was likely to obstruct justice, had the facts been as they believed them to be.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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